

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 07-233V

July 31, 2007

Not to be Published

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KRISTY PAULSEN and SHANNON \*  
BERHORST as legal representatives of \*  
LANDON MICHAEL LEE BERHORST, \*

Petitioners, \*

v. \*

SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Mindy Michaels Roth, Glen Rock, NJ, for petitioners.  
Michael P. Milmo, Washington, DC, for respondent.

Entitlement; no expert witness  
to substantiate allegations

**MILLMAN, Special Master**

### DECISION<sup>1</sup>

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

On April 11, 2007, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine, acellular DPT vaccine, HiB vaccine, and polio vaccine administered February 7, 2006 caused the death of their son Landon Berhorst (hereinafter, “Landon”) on February 14, 2006.

On July 23, 2007, petitioners filed a Motion for Ruling on the Record, reflecting that they failed to find an expert medical witness to substantiate their allegations.

This case must be dismissed for petitioners’ failure to prove a prima facie case of causation in fact from the vaccinations to Landon’s tragic death.

### **FACTS**

Landon was born on October 20, 2005. Med. recs. at Ex. 1, p. 1.

On February 7, 2006, at three and one-half months of age, he received his first hepatitis B, first acellular DPT, first HiB, and first polio vaccinations. Med. recs. at Ex. 10, p. 1.

On February 10, 2006, Landon was brought to a clinic because he had a white tongue and white spots inside his mouth. He had not been eating well for one day. Med. recs. at Ex. 10, p. 2. The diagnosis was thrush. He was prescribed Nystatin oral with Nystatin cream for the diaper area. *Id.*

On February 11, 2006, at 8:37 p.m., Landon was brought to Blessing Hospital Emergency Room where he was diagnosed with sepsis and status epilepticus. Med. recs. at Ex. 12, p. 1. A spinal tap done on that day showed protein of 66 when the normal range is 15-45 mg/dl. Med. recs. at Ex. 12, p. 15.

Also on February 11, 2006, a St. Louis Children’s Hospital transport record states that the grandmother gave a history that about two weeks previously, Landon had bronchiolitis and was

treated with Erythromycin. He returned to his usual self and was spending the weekend with his grandparents. He was in his usual state of health that day. Med. recs. at Ex. 13, pp. 2, 3. Then, that evening, the grandmother went to awaken Landon from sleep. She dressed him and he was not waking fully. She noticed he had funny breathing (rapid short breaths), no cyanosis, positive tonic movement, no fever, rhinorrhea, earache, respiratory symptoms, emesis, diarrhea, or rashes. *Id.*

Also on February 11, 2006, Landon was transported to St. Louis Children's Hospital. Med. recs. at Ex. 13, p. 55. His grandparent today noted that Landon was cold and not acting right. He was taken to the ER where he was seizing. He had been medicated with Ativan and Phenobarbital. The seizure lasted about 30 minutes. Landon vomited twice. *Id.*

On February 12, 2006, a history and physical was taken. Med. recs. at Ex. 13, p. 58. Landon was previously healthy and was well the day before. He looked great and ate well all day. He had his two-month vaccinations five days previously. He had no cough, congestion, fever, or rhinorrhea. He had no change in appetite, vomiting, or diarrhea. All other systems were negative. *Id.*

On February 12, 2006, a consultation form notes Landon was previously healthy. Med. recs. at Ex. 13, p. 59.

On February 12, 2006, Dr. Nikoleta S. Kolovos, the PICU attending, wrote that Landon had no significant past medical history. He was in his usual state of good health until early yesterday evening. Med. recs. at Ex. 13, p. 60.

On February 12, 2006, the social worker Stephanie L. Whitaker, interviewed Landon's grandmother who stated that Landon's mother and father did not express any concerns for

Landon's health or overall affect prior to his visit of February 11, 2006. Med. recs. at Ex. 13, pp. 40, 41. Landon got fussy only when he was hungry or sleepy. He received his first vaccinations on February 7, 2006. On February 9, 2006, he went to the health clinic for white spots in his mouth or thrush. The thrush medication made Landon sleepy. His mother gave the first dose to him on February 10, 2006. The grandmother provided the medication to him twice on February 11, 2006. Landon was normal and happy. She noticed no odd or abnormal behavior. That afternoon, Landon played with his grandfather and nothing appeared abnormal. At 7:00 p.m., Landon's eyes rolled back in his head. Med. recs. at Ex. 13, p. 41.

Landon's father's niece has a seizure disorder. Med. recs. at Ex. 13, p. 42. The grandfather said that Landon's parents did not express any concerns regarding Landon's health or overall affect prior to his visit on February 11, 2006. It was not abnormal for Landon to sleep for long periods of time. He had his first vaccinations on February 7, 2006. He went to the health clinic on February 9, 2006 for white spots in his mouth or thrush. *Id.* Landon was normal and happy on his arrival to his grandparents' home. The grandfather got on the floor with Landon and played. There was nothing abnormal about his health or affect. Med. recs. at Ex. 13, p. 43.

Landon's father said that it was not abnormal for Landon to sleep for long periods of time. Landon was grouchy during the time he was diagnosed with thrush. Otherwise, he was healthy and happy. The father has cousins with two children who died, one at 11 days of age and the other at seven years of age. *Id.*

Landon's mother said she did not notice any change in Landon's behavior or affect. She described Landon as normal and happy. *Id.* She said it was not unusual for Landon to sleep long hours. Med. recs. at Ex. 13, p. 44. Landon was cranky and fussy before he was diagnosed with

thrush and continued to be fussy until after his first round of thrush medicine. He had his first vaccinations on February 7, 2006 due to a conflict in scheduling at the clinic and due to Landon being ill with bronchiolitis, prolonging when he could receive the vaccinations. *Id.*

Also on February 12, 2006, Dr. Marcella M. Donaruma-Kwoh, Stephanie Whitaker, and Maria Spivey did a social work assessment because of concern for an inflicted injury. Med. recs. at Ex. 13, p. 33. They interviewed the paternal grandmother Vickie Berhorst who stated that Landon's parents dropped off their children at 9:00 a.m. on February 11<sup>th</sup>. Landon was awake and smiling. He responded to her voice, cooing. At 11:00 a.m., Landon drank a full 11 ounces of formula without difficulty and fell asleep. He woke at 3:00 p.m. and played with his grandfather. At 5:00 p.m., Landon got fussy and Mrs. Berhorst gave him another six ounces which he drank without difficulty. She placed in him a crib to sleep. *Id.* At 7:00 p.m., Mrs. Berhorst went to wake Landon. Med. recs. at Ex. 13, p. 34. His sleeper was wet so she changed him and he slept right through the change. His breathing sounded like snoring. His arms and legs got stiff and his neck went back. His color did not change or his breathing pause. This resolved on its own but reoccurred. Landon did not have a fever or atypical behavior that day. *Id.*

The doctor and two social workers interviewed the paternal grandfather Mike Berhorst. At 9:00 a.m., Landon was laughing and carrying on. In the afternoon, after Landon had had his bottle, Mr. Berhorst put him on his lap and then moved to a blanket on the floor so Landon could really kick his legs. Landon was playing, smiling, and laughing. *Id.*

The doctor and two social workers interviewed Landon's father Shannon Berhorst. Landon was the happiest baby in the world, he said. On Saturday, February 11<sup>th</sup>, at 1:30 a.m.,

Mr. Berhorst fed Landon a six-ounce bottle of Enfamil formula without difficulty. He changed Landon's diaper, and put him to bed. His mother woke Landon at about 8:30 a.m. and Landon was smiling and happy when he was dropped off at his grandparents' house. Landon was a little cranky on Thursday, Feb. 9<sup>th</sup>, when his mother Kristy Paulsen took him to see Dr. Yo, his pediatrician, who diagnosed Landon with thrush. *Id.* Landon was his usual happy self when Mr. Berhorst fed him on the night of Feb. 10<sup>th</sup>. Med. recs. at Ex. 13, p. 35. Landon had not had any fevers, rashes, or other health problems since his diagnosis of bronchiolitis at about three weeks of age. He did not have any fever, rash, feeding problems or atypical behavior in the prior week other than the thrush. *Id.*

The doctor and two social workers interviewed Kristy Paulsen, Landon's mother, who described Landon as being all smiles when she woke him at about 8:30 a.m. February 11<sup>th</sup>. He was a happy baby who was a little cranky on Thursday, February 9<sup>th</sup>, but seemed to be back to his normal self by Friday night, February 10<sup>th</sup>, after he received the thrush medicine that Dr. Yo prescribed after an office visit that same day. *Id.* Landon did not have any fever, rash, feeding problems, or atypical behavior in the prior week other than the thrush. He had bronchiolitis three weeks earlier treated with Azithromycin and Albuterol. He received his first set of vaccinations on Thursday, February 7<sup>th</sup>. *Id.*

Landon had significant metabolic acidosis, raising the question of a metabolic disorder. Med. recs. at Ex. 13, p. 37.

On February 14, 2006, Dr. Donaruma-Kwoh concluded that, at that time, it was not possible to say whether or not Landon's injury was inflicted or organic. Med. recs. at Ex. 13, p. 74.

On February 14, 2006, Landon died. Dr. Phillip M. Burch conducted an autopsy, concluding that the immediate cause of his death was hypoxic encephalopathy secondary to new-onset seizures of undetermined nature. Landon had cerebral edema and ischemia, and pneumonia in his lungs. Med. recs. at Ex. 15, pp. 1, 6, 7.

On February 18, 2006, Dr. Matthew I. Goldsmith of St. Louis Children's Hospital wrote a death summary. Landon had no significant past medical history. He was transferred from Blessing Hospital on February 12, 2006. The history received was that he was in his usual state of good health until the day of admission when he was put down for a nap. Two hours later, his grandmother found him stiff and seizing. Med. recs. at Ex. 13, p. 31.

On April 3, 2006, the death certificate attributed Landon's death to hypoxic encephalopathy due to new-onset seizures of undetermined nature. Med. recs. at Ex. 14.

## **DISCUSSION**

To satisfy their burden of proving causation in fact, petitioners must offer "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]"

In Capizzano v. Secretary of HHS, 440 F.3d 1317, 1325 (Fed. Cir. 2006), the Federal Circuit said “we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen...”

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioners must show not only that but for the vaccines, Landon would not have had the seizure or seizures and died, but also that the vaccines were substantial factors in bringing about his seizure or seizures four days after vaccination. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

The histories that the parents and grandparents gave show that, except for thrush, Landon had no reaction to his vaccinations: no fever, no alteration in affect, no diminished eating, no change in sleeping habits. He has happy, responsive, ate well, and seemed his normal self once he began his thrush medication. Then, four days after his vaccinations, he had the tragic onset of seizures which led to his hypoxic encephalopathy and death.

Legally, in order to make a prima facie case, petitioners must have expert medical support for their allegation of causation in fact. They do not have an expert medical witness although they have tried to find one. Because petitioners have failed to make a prima facie case, this petition must be dismissed. The undersigned extends her sympathy to Landon’s grieving family.



## **CONCLUSION**

This petition must be dismissed. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.<sup>2</sup>

**IT IS SO ORDERED.**

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Laura D. Millman  
Special Master

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.